

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE POLK COUNTY BOARD OF COMMISSIONERS

In the Matter of Jeremy Amiot

**RECOMMENDATION ON MOTION FOR  
SUMMARY DISPOSITION**

This matter is before Administrative Law Judge Steve M. Mihalchick on Polk County's Motion for Summary Disposition. Polk County filed its motion April 1, 2009. Mr. Amiot filed a reply on April 20, 2009, and Polk County filed a response on April 30, 2009. Oral argument was heard by telephone conference on May 6, 2009. The motion record closed on that date.

Nicholas G. B. May, Fabian May & Anderson PLLP, appeared for Jeremy Amiot (the Applicant). Michael T. Rengel, Pemberton, Sorlie, Rufer, Kershner PLLP, appeared for Polk County (the County).

Based upon all the files, records and proceedings herein, and for the reasons set forth in the following Memorandum, the Administrative Law Judge makes the following:

**ORDER**

The Applicant's motion for an order requiring the County to produce a copy of the entire CJIS Security Policy is **DENIED**.

The Administrative Law Judge also makes the following:

**RECOMMENDATION**

**IT IS HEREBY RESPECTFULLY RECOMMENDED** that the Polk County Board of Commissioners order that:

1. Polk County's Motion for Summary Disposition be **GRANTED**.

1. The claim of Jeremy Amiot for relief under the Minn. Stat. Ch. 364 be **DISMISSED**.

Dated: December 23, 2009

/s/ Steve M. Mihalchick

---

STEVE M. MIHALCHICK  
Administrative Law Judge

## **NOTICE**

This report is a recommendation, not a final decision. The Polk County Board of Commissioners will make the final decision after a review of the record. The Board may adopt, reject, or modify this Recommendation. Under Minn. Stat. § 14.61, the final decision of the Board shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Polk County Board of Commissioners. Parties should contact the Board to learn the procedure for filing exceptions or presenting argument.

The County is requested to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

## **MEMORANDUM**

### **Procedural Background**

In March 2008, the Applicant applied for an Information Technology (IT) Analyst position with the County. He disclosed on his application that he had been convicted of possession of a controlled substance. The County declined to grant the Applicant an interview for the position. Upon later inquiry, the Applicant was informed by County representatives that he was not granted an interview because of his criminal conviction.

On, December 1, 2008, the Applicant, by counsel, submitted a letter to the County alleging that the County had violated his rights under Minn. Stat. Ch. 364 (Chapter 364) "in numerous ways." Chapter 364, among other things, prohibits the disqualification of any person from public employment because of a prior conviction of a crime, unless the crime directly relates to the position of employment sought.<sup>1</sup> The Applicant requested that the County initiate an administrative hearing as required by Minn. Stat. § 364.06 and *Commers v. Spartz*, 294 N.W.2d 321 (Minn. 1980).

---

<sup>1</sup> Minn. Stat. § 364.03, subd. 1.

The County received the request for hearing on December 3, 2008. On December 5, 2008, the County contacted the Office of Administrative Hearings and faxed it a copy of the request for hearing. On January 13, 2009, the Office of Administrative Hearings sent the County a Request for Administrative Law Judge Services form and directions on preparing an Order for Prehearing Conference.

The County issued and served a Notice and Order for Prehearing Conference on January 14, 2009, that set a telephone prehearing conference for January 21, 2009. It stated that the issue was, "Whether Polk County violated Minn. Stat. § 364.03, by failing to grant Mr. Amiot an interview for the position applied for with Polk County."

The telephone conference was held as scheduled. The Administrative Law Judge ordered the Applicant to serve and file a more definite Statement of Claim. A schedule for discovery dispositive motions was established. During the telephone conference, the County stated that an FBI Criminal Justice Information System (CJIS) Security Policy document, which prohibited allowing the Applicant access to the CJIS terminals on the County's computer system, would be an issue in the case.

The Applicant served and filed a Notice of Claims on February 4, 2009, containing the following factual allegations:

The Applicant submitted an application to the County March 21, 2008, for an open IT Analyst position and truthfully answered "yes" to question on the application, "Have you ever been convicted [or charged] with a misdemeanor or a felony?"

Polk County disqualified him from consideration for the position due to his prior conviction. Two County employees expressly told him that the sole reason for his disqualification was because of his prior conviction.

Polk County failed to give him a written notification that he was being disqualified due to his prior conviction and failed to provide him an opportunity to present evidence of rehabilitation

The Notice of Claims alleged that by such conduct the County violated Minn. Stat. §§ 364.03 and 364.05. The Applicant requested relief in the form of compensatory damages for loss of income, emotional distress, and related damages; damages for violations of Minn. Stat. § 364.01 *et seq.*; costs, disbursements, and attorneys fees; and other relief as deemed just and equitable.

The Applicant requested a copy of the CJIS Security Policy from the County in discovery. On March 10, 2009, the County notified the Administrative Law Judge and the Applicant that it had not been able to obtain approval from the Minnesota Bureau of Criminal Apprehension (BCA) that would allow it to provide copies of the CJIS Security Policy. The BCA is the state agency that administers the CJIS in Minnesota. The County requested a discovery conference.

The discovery conference was held by telephone on March 16, 2009. The County stated that the CJIS Security Policy was labeled as "Sensitive But Unclassified" (SBU). The Administrative Law Judge asked the County to provide additional information regarding the meaning and legal implications of the SBU label. The possibility of the Administrative Law Judge issuing an order under Minn. Stat. § 13.03, subd. 6, requiring the County to provide the CJIS Security Policy to the Administrative Law Judge for *in camera* review was also discussed.

On March 17, 2009, the County submitted a letter stating that it had found little specific guidance on the laws preventing disclosure of SBU materials that originate with the FBI. It attached copies of federal government web pages with statements that the CJIS Security Policy is considered SBU and may not be shared with persons not engaged in law enforcement or the administration of criminal justice.

The Administrative Law Judge researched the issues raised and on March 19, 2009, sent the parties an email requesting further comment from them. As stated in that email, position papers and federal agency documents posted to the Internet indicate that SBU is the formal designation for information that by law or regulation requires some form of protection from public disclosure, but that is outside the formal system of classification of sensitive data as "confidential," "secret," or "top secret." The SBU designation was created by President Bush in an Executive Order following the attacks on September 11, 2001. In 2008, the Bush Administration released new standards for labeling SBU information and replaced the SBU designation with "Controlled Unclassified Information" (CUI). The designation clarifies that it applies to information whose public dissemination is restricted by law or regulation. The CJIS Security Policy had previously been designated SBU by the CJIS unit of the FBI. The Administrative Law Judge also found an Association of Public Safety Communication Officials International publicly available website containing a "Frequently Asked Questions" (FAQ) document that was not labeled as SBU or CUI. It had several questions and answers regarding denying convicted felons access to criminal information systems. It quotes a CJIS Security Policy provision that prohibits CJIS access to any person convicted of a felony of any kind, except that a hiring authority may ask for review by a CJIS official in extenuating circumstances where the severity of the offense and passage of time would support a possible variance.

The Administrative Law Judge's email closed with the following:

If I am correct that this is the policy applied by Polk County, then I doubt that it is necessary to order that the CJIS Security Policy be provided to the Applicant, even under a protective order. The requirement for denying access to felons appears to be adequately described in the FAQ document and the rest of the CJIS Security Policy document is irrelevant here. I would like your comments on this information.

On March 25, 2009, the Applicant's counsel, who had been out of the office, requested additional time to file a motion to compel production of the CJIS Security Policy. Also that day, the County confirmed that the FAQ document accurately quoted

the relevant provision of the CJIS Security Policy and continued to oppose disclosure of the remainder of the CJIS Security Policy.

On March 30, 2009, the Administrative Law Judge denied the Applicant's motion in an Order as follows:

I am hereby denying, for the time being, the Applicant's Motion to Compel Discovery of the CJIS Security Policy and his request that he be allowed additional time to set forth legal and factual arguments on that issue. However, the Applicant may assert those arguments in his response to the Summary Disposition Motion to be filed by the County on April 1, 2009.

The reason for this ruling is that the basis for the Summary Disposition Motion is not yet entirely clear. It may not be based entirely upon the CJIS Security Policy. Thus, there are questions remaining in my mind about the Applicant's need for the entire document or for anything beyond the description of the policy stated in Mr. Rengel's last email. The Summary Disposition Motion may help the Applicant understand that need and explain it to me.

On April 1, 2009, the County filed its Motion for Summary Disposition. The County argued that it is entitled to summary disposition because the Applicant's felony conviction disqualifies him from the IT Analyst position and because the position is exempt from the requirements of Minn. Stat. Ch. 364.

On April 6, 2009, the County filed a letter motion requesting the suppression of an audio compact disc purported to contain recordings made by the Applicant of conversations he had with County personnel on April 30, May 1, and May 5, 2008. The County had received the CD that day from the Applicant as a response to discovery requests that had been made as early as February 9, 2008, and had not had an opportunity to examine the content of the CD. The County requested that the recordings be suppressed for failure to disclose the CD in a timely manner, and, further, that the County be awarded attorneys fees and expenses incurred by it in connection that failure. The Applicant was allowed to file a response and did so on April 13, 2009. The Applicant admitted that he made secret recordings of some number of his discussions with County representatives. The Applicant's counsel stated that the failure to produce the recordings in a timely fashion had been an oversight by him. The County filed a Reply on April 14, 2009. Oral argument was held by telephone on April 16, 2009. During the conference, the County stated that the recordings confirmed the affidavits of its witnesses in its Motion for Summary Disposition.

The Administrative Law Judge issued an Order on the Motion to Suppress Recordings on April 20, 2009, largely confirming rulings made during the oral argument. The County's Motion to suppress the CD was granted in part. In particular, the CD could not be used by the Applicant in his response to the County's pending Motion for Summary Disposition, but could be used by either party in any subsequent proceeding

in this matter. The Applicant was ordered to provide to the County complete copies of any portions of the discussions that were now disclosed on April 6, 2009, and any other such recordings not previously provided to the County. The County's Motion for Attorney's Fees and Expenses was denied.

The Applicant filed a reply to the Motion for Summary Disposition on April 20, 2009. The County filed a response on April 30, 2009. Oral argument was heard by telephone conference on May 6, 2009. The motion record closed on that date.

## Summary Disposition

Summary disposition is the administrative law equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law.<sup>2</sup> The Office of Administrative Hearings has generally followed the summary judgment standards developed in the state courts when deciding motions for summary disposition in contested case matters.<sup>3</sup> A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case.<sup>4</sup>

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact. To successfully resist a motion for summary judgment, the non-moving party must show that there are specific facts in dispute which have a bearing on the outcome of the case.<sup>5</sup> The nonmoving party must establish the existence of a genuine issue of material fact by substantial evidence; general averments are not enough to meet the nonmoving party's burden of production.<sup>6</sup> The evidence presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial.<sup>7</sup>

When considering a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party.<sup>8</sup> All doubts and factual inferences must be resolved against the moving party.<sup>9</sup> If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.<sup>10</sup>

---

<sup>2</sup> *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); Minn. R. 1400.5500K; Minn. R. Civ. P. 56.03.

<sup>3</sup> See Minn. R. 1400.6600.

<sup>4</sup> *Illinois Farmers Insurance Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateau v. Minnesota Department of Public Welfare*, 356 N.W.2d 804, 808 (Minn. App. 1984).

<sup>5</sup> *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Hunt v. IBM Mid-America Employees Federal*, 384 N.W.2d 853, 855 (Minn. 1986).

<sup>6</sup> *Id.*; *Murphy v. Country House, Inc.*, 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (Minn. 1976); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 75 (Minn. App. 1988).

<sup>7</sup> *Carlisle*, 437 N.W.2d at 715 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).

<sup>8</sup> *Ostendorf v. Kenyon*, 347 N.W.2d 834 (Minn. App. 1984).

<sup>9</sup> See, e.g., *Celotex*, 477 U.S. at 325; *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Greaton v. Enich*, 185 N.W.2d 876, 878 (Minn. 1971); *Thompson v. Campbell*, 845 F. Supp. 665, 672 (D. Minn. 1994).

<sup>10</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

## Factual Background

Considering the evidence presented in the parties' affidavits and exhibits in the light most favorable to the Applicant, the following facts appear:

Tangee Bouvette is the Human Resources/Special Projects Coordinator in the County Coordinator's Office. The Applicant came into the Coordinator's Office in March 2008 to pick up an application packet for the open IT Analyst position. Bouvette gave the Applicant and application packet. He completed and signed the application about March 20, 2008, and returned it to the County.<sup>11</sup>

The County's IT personnel, including any person hired for the open IT Analyst position, work on the County's computer systems and network. This network includes the CJIS terminals located in the Polk County Sheriff's Department, the Polk County Attorney's Office, and the Tri-County Community Corrections Department. Those three departments make up a large portion of the work performed by personnel in the County's IT Department. All IT personnel work on the County's computer network and those departments' computer systems and CJIS terminals.<sup>12</sup>

The Polk County Sheriff's Department, the Polk County Attorney's Office, and the Tri-County Community Corrections Department are law enforcement agencies and have a need for the criminal information now maintained in the FBI's CJIS. In order to have CJIS terminals and access the CJIS network, the departments are all required to execute and maintain agreements with the Minnesota Bureau of Criminal Apprehension (BCA). Those agreements require the departments to maintain the CJIS terminals in a secure location and to comply with all FBI rules for granting access to the terminals.<sup>13</sup>

An FBI document entitled "CJIS Security Policy" contains the FBI rules maintaining security of the CJIS terminals and system. It has specific requirements for granting access to the CJIS terminals and system. Under CJIS Security Policy Section 4.5.1., a person with a felony conviction of any kind may not be granted access to CJIS computer systems, absent a variance requested by the County.<sup>14</sup>

Sheila Menard is the Terminal Agency Coordinator for the Sheriff's Department's CJIS terminals. She performs the background checks for potential IT Department employees. If any criminal conviction exists on an applicant's, she notifies the Human Resources person that, because of the language in the CJIS Security Policy, the person cannot be hired without a request for a variance.<sup>15</sup>

The County Attorney and the Chief Deputy Sheriff are of the opinion that employing an IT person convicted of a crime in Polk County to work on the County's criminal data computer terminals and files would be an unreasonable security risk,

---

<sup>11</sup> Affidavit of Tangee Bouvette at ¶¶ 1-5 and Ex. A; Affidavit of Jeremy Amiot at ¶ 2.

<sup>12</sup> Bouvette Affidavit at ¶ 14-15; Affidavit of Sheila Menard at ¶ 11.

<sup>13</sup> Bouvette Affidavit at ¶ 14 and Ex. B; Affidavit of Sheila Menard at ¶ 3-5.

<sup>14</sup> Menard Affidavit at ¶¶ 7-8; Affidavit of Karl Erickson at ¶ 2-5.

<sup>15</sup> Menard Affidavit at ¶¶ 7-8.

principally because such a person would have the ability to access and manipulate his or her own criminal data.<sup>16</sup>

The County's employment application form asks, "Have you ever been convicted [or charged] with a misdemeanor or a felony?" The form also contains a notice that the County may conduct a criminal background check by the BCA for some positions. On his application, the Applicant stated that he had pleaded guilty to possession of a controlled substance in Polk County in February, 1997.<sup>17</sup> More specifically, he had pleaded guilty to a "controlled substance crime in the fifth degree," which is a felony.<sup>18</sup> His sentence was stayed pending successful completion of probation. He successfully completed his probation approximately 29 months after sentencing.<sup>19</sup>

Bouvette reviewed the Applicant's application with the County's Network Administrator and found the Applicant lacking in appropriate experience. Based upon the lack of appropriate experience and negative impressions she had from meeting the Applicant, they decided not to grant the Applicant an interview for the IT Analyst position.<sup>20</sup> The County provided no notice to the Applicant at that time that he was no longer under consideration for the position.

The Applicant returned to see Bouvette on about April 29 and asked why he had not been interviewed. She looked at his application and then told him that it was because of his criminal conviction.<sup>21</sup>

The Applicant returned the next day and had a brief discussion with Bouvette. She told him that other applications were just being delivered and again stated that he was disqualified because of his criminal conviction. The Applicant asked to meet with Jack Schmalenberg, the County Coordinator. Bouvette set up the meeting up for the next day, May 1, 2008.

Schmalenberg confirmed that the Applicant was disqualified from the IT Analyst position because of his criminal conviction and that such disqualification was automatic for positions that work with law enforcement.

For purposes of this Motion for Summary Disposition, whether or not the Applicant's conviction was a factor in late March or early April, by April 29, 2008, it had become a factor in the County's decision.

## **Legal Analysis**

### **The Statute**

Minn. Stat. Ch. 364 (2008) provides, in relevant part:

---

<sup>16</sup> Erickson Affidavit at ¶¶ 6-7; Affidavit of Greg Widseth at ¶ 5.

<sup>17</sup> Bouvette Affidavit, Ex. A.

<sup>18</sup> Amiot Affidavit at ¶ 2; Minn. Stat. §§ 152.025 and 609.02, subd. 2.

<sup>19</sup> Amiot Affidavit at ¶ 2.

<sup>20</sup> Bouvette Affidavit at ¶ 8.

<sup>21</sup> Bouvette Affidavit at ¶ 8; Amiot Affidavit at ¶ 5.



### **364.03 RELATION OF CONVICTION TO EMPLOYMENT OR OCCUPATION.**

Subdivision 1. **No disqualification from licensed occupations.** Notwithstanding any other provision of law to the contrary, no person shall be disqualified from public employment, nor shall a person be disqualified from pursuing, practicing, or engaging in any occupation for which a license is required solely or in part because of a prior conviction of a crime or crimes, unless the crime or crimes for which convicted directly relate to the position of employment sought or the occupation for which the license is sought.

Subd. 2. **Conviction relating to public employment sought.** In determining if a conviction directly relates to the position of public employment sought or the occupation for which the license is sought, the hiring or licensing authority shall consider:

- (1) the nature and seriousness of the crime or crimes for which the individual was convicted;
- (2) the relationship of the crime or crimes to the purposes of regulating the position of public employment sought or the occupation for which the license is sought;
- (3) the relationship of the crime or crimes to the ability, capacity, and fitness required to perform the duties and discharge the responsibilities of the position of employment or occupation.

Subd. 3. **Evidence of rehabilitation.** (a) A person who has been convicted of a crime or crimes which directly relate to the public employment sought or to the occupation for which a license is sought shall not be disqualified from the employment or occupation if the person can show competent evidence of sufficient rehabilitation and present fitness to perform the duties of the public employment sought or the occupation for which the license is sought. Sufficient evidence of rehabilitation may be established by the production of:

- (1) a copy of the local, state, or federal release order; and
- (2) evidence showing that at least one year has elapsed since release from any local, state, or federal correctional institution without subsequent conviction of a crime; and evidence showing compliance with all terms and conditions of probation or parole; or
- (3) a copy of the relevant Department of Corrections discharge order or other documents showing completion of probation or parole supervision.

(b) In addition to the documentary evidence presented, the licensing or hiring authority shall consider any evidence presented by the applicant regarding:

(1) the nature and seriousness of the crime or crimes for which convicted;

(2) all circumstances relative to the crime or crimes, including mitigating circumstances or social conditions surrounding the commission of the crime or crimes;

(3) the age of the person at the time the crime or crimes were committed;

(4) the length of time elapsed since the crime or crimes were committed; and

(5) all other competent evidence of rehabilitation and present fitness presented, including, but not limited to, letters of reference by persons who have been in contact with the applicant since the applicant's release from any local, state, or federal correctional institution.

#### **364.05 NOTIFICATION UPON DENIAL OF EMPLOYMENT OR DISQUALIFICATION FROM OCCUPATION.**

If a hiring or licensing authority denies an individual a position of public employment or disqualifies the individual from pursuing, practicing, or engaging in any occupation for which a license is required, solely or in part because of the individual's prior conviction of a crime, the hiring or licensing authority shall notify the individual in writing of the following:

(1) the grounds and reasons for the denial or disqualification;

(2) the applicable complaint and grievance procedure as set forth in section 364.06;

(3) the earliest date the person may reapply for a position of public employment or a license; and

(4) that all competent evidence of rehabilitation presented will be considered upon reapplication.

#### **364.09 EXCEPTIONS.**

(a) This chapter does not apply to . . . law enforcement agencies as defined in section 626.84, subdivision 1, paragraph (f); . . .

Minn. Stat. § 626.84, subd. 1(f), in relevant part, defines "law enforcement agency" as "a unit of state or local government that is authorized by law to grant full powers of

arrest and to charge a person with the duties of preventing and detecting crime and enforcing the general criminal laws of the state; . . .”<sup>22</sup>

### **Federal Preemption**

The County argues that Chapter 364 is federally preempted by the CJS Security Policy because their provisions conflict. The CJS Security Policy forbids granting access to CJIS systems to all convicted felons, while Chapter 364 would allow access to a convicted felon if the crime did not relate directly to the position sought or the applicant demonstrates rehabilitation.

The County’s federal preemption argument is not well-taken. The CJS Security Policy contains a variance procedure that allows consideration of the nature of the crime, the passage of time, and similar issues, much like Chapter 364. It is possible to comply with both the CJS Security Policy and Chapter 364. The conflict does not exist. As to the use of the variance procedure in this case, there are fact issues that preclude summary disposition. The fact issues go to whether the variance should be requested and whether it would be granted.

### **Law Enforcement Agency Exemption**

Alternatively, the County argues that the IT Analyst position is exempt under Minn. Stat. § 364.09 because the work is performed in all County departments, including the Sheriff’s Department and, therefore, the law enforcement agency exemption should apply.

The Applicant claims that the position is not in law enforcement.

The County is correct. The IT Analyst position is required to work in the Sheriff’s Department, which includes employees with the power of arrest and duty to enforce criminal laws. It is a law enforcement agency. It is irrelevant that the IT Analyst position has no law enforcement duties. In today’s network systems, an IT person can work from anywhere there is a network connection to the Sheriff’s Department’s computer systems; even remotely. Accordingly, an IT person must pass all security requirements that apply to anyone physically working within that department. The Sheriff’s Department work is sufficient to exempt this hiring assignment from Chapter 364. The same is true of the County Attorney’s Office and the Corrections Department. They,

---

<sup>22</sup> Chapter 364 was amended in 2009 by adding the following section:

**364.021 PUBLIC EMPLOYMENT; CONSIDERATION OF CRIMINAL RECORDS.**

- (a) A public employer may not inquire into or consider the criminal record or criminal history of an applicant for public employment until the applicant has been selected for an interview by the employer.
- (b) This section does not apply to the Department of Corrections or to public employers who have a statutory duty to conduct a criminal history background check or otherwise take into consideration a potential employee’s criminal history during the hiring process.
- (c) This section does not prohibit a public employer from notifying applicants that law or the employer’s policy will disqualify an individual with a particular criminal history background from employment in particular positions.

too, have CJIS terminals and have employees who enforce criminal laws. They are law enforcement agencies as well.

The law enforcement agency exemption in Minn. Stat. § 364.09 applies in this case. Therefore, none of the requirements of Chapter 364 apply and this matter should be dismissed.

### **Conviction Directly Related to Position Sought**

The County also argues that the Applicant's felony conviction directly relates to the position of employment and is therefore a proper disqualification under Minn. Stat. § 364.03, subd. 1. It argues that because the CJIS Security Policy precludes the Applicant's employment because of his conviction, the conviction directly relates to the position. That argument is similar to the federal preemption argument and raises fact issues regarding a possible variance request.

The County also argues that public policy regarding the security risk of allowing an IT Analyst access to his own criminal records demonstrates that the Applicant's felony conviction directly relates to the position sought. This argument is correct, his conviction does directly relate to the position sought. However, Chapter 364 still applies and under Minn. Stat. § 364.03, subd. 3, the Applicant must be allowed to show competent evidence of sufficient rehabilitation and present fitness to perform the duties of the job. There are disputed fact issues regarding the Applicant's rehabilitation that preclude summary disposition on this issue.

### **Conviction not a Factor in Denying Position**

The County argues that the reasons for not granting the Applicant an interview did not include his criminal conviction. However, for purposes of this motion, it has been assumed that it was a factor. There was no direct evidence that it was a factor until April 29, 2008, when Bouvette said it was. It appears that the process was still going on at that time because she had just delivered the applications to someone, apparently for further processing. In addition, once the process got much further, there would have been a background check completed and the Applicant would have been denied the position at least in part because of the conviction. So, viewing the evidence in the light most favorable to the Applicant, his conviction has been considered to have been a factor in the County's decision.

### **Conclusion**

Because the IT Analyst position sought by the Applicant serves a law enforcement agency, it is exempt under Minn. Stat. § 364.09 from the requirements of Chapter 364. Therefore, this matter should be dismissed.

### **Discovery of the CJIS Security Policy**

The Applicant renews its arguments that it should be provided a copy of the entire CJIS Security Policy under a protective order. He argues that because the

County has relied extensively upon the CJIS Security Policy in its Motion for Summary Disposition, he is extremely prejudiced by not being able to examine the entire policy.

The Administrative Law Judge is not persuaded. The only relevant portion of the CJIS Security Policy is that related to access by convicted felons. This requirement was adequately described in the FAQ document,<sup>23</sup> and confirmed by the County witness affidavits. The Applicant has no need for other information regarding securing the CJIS system. Electronic security and criminal records security are very important issues in today's world of electronic crime and intrusion. The SBU label applied by the FBI to the CJIS Security Policy highlights that concern and cannot be taken lightly. Balancing the security interests against the discovery needs of the Applicant, as is required under Minn. Stat. § 13.03, subd. 6, the Applicant's request is denied.

**S.M.M.**

---

<sup>23</sup> Heggem Affidavit, Ex. A.